NO. 3845

United States
Circuit Court of Appeals
For the Ninth Circuit

JAMES C. DAVIS, as DIRECTOR GENERAL OF RAILROADS, operating the Chicago, Milwaukee & St. Paul Railway and AGENT appointed under the Transportation Act of 1920.

Plaintiff in Error,

vs.

AMERICAN SILK SPINNING COMPANY, a corporation,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

BRIEF OF PLAINTIFF IN ERROR

GEO. W. KORTE,
C. H. HANFORD,
Attorneys for Plaintiff in Error.

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STATEMENT OF THE CASE

This is an action at law by the American Silk Spinning Company, a corporation, against the Director General of Railroads, to recover damages for alleged breach of the land carrier's contract for through transportation of 1,000 bales of silk waste from Hong Kong, China, by ship to Tacoma, Wash-

ington, and thence by the Chicago, Milwaukee & St. Paul Railway and connecting carriers to Providence, Rhode Island.

In the month of June, 1918, the 1,000 bales were received by the Osaka Shosen Kaisha Steamship Company at Hong Kong, China, and thereupon that corporation, not jointly, but separately for itself and as agent of the Chicago, Milwaukee & St Paul Railway Company, issued four through Trans-Pacific and Overland order bills of lading (*Ex.* 8, 9, 10, 11; *Rec.* 642, 644, 648), two of which were for 200 bales each and the other two for 300 bales each, without mentioning the grade of silk waste contained in said bales.

The consignees named in three of said bills of lading were Messrs. Heidelbach, Ickelheimer & Company and, in the fourth bill of lading, Messrs. Goldman, Sachs & Company, bankers in New York.

Each of said bills of lading of the land carrier contained clauses as follows:

> "B. With respect to the service after delivery at the port 'A' first above mentioned, and until delivery at the point 'B' the second before mentioned, it is agreed that:
>
> "1. No carrier or party in possession of the property herein described shall be liable for any loss thereof, or damage thereto, or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper, or owner, or for differences in the weights of grain, seed or other commodities caused by natural shrinkage or discrepancies in elevator weights."
>
> "2. Except in the case of negligence of the carrier or party in possession and the burden to prove freedom from such negligence shall

be on the carrier or party in possession, the carrier or party in possession shall not be liable for loss, damage or delay occurring while the property described herein is stopped and held in transit upon request of the shipper, owner or party entitled to make such request; or resulting from a defect or vice in the property, or from the riots, or strikes."

"4. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable despatch."

"8. Any carrier or party liable on account of loss or damage to any of said property shall, by right of subrogation, have the full benefit of any insurance that may have been effected upon or on account of said property."

All of the 1,000 bales were shipped from Hong Kong on the Steamship "Canada Maru," and all were finally delivered by the railroad carriers at Providence, Rhode Island. On the 30th day of July, 1918, before arrival at her port of delivery, that vessel was stranded upon the rocks near Cape Flattery and so damaged that great quantities of sea water entered her cargo spaces (Ship's Log, *Ex.* 20). The ship was floated and towed to Tacoma where she arrived on the 10th day of August (*Rec.* 338), and 133 of the bales were taken out of the ship in an undamaged condition and promptly forwarded to destination (*Rec.* 9). The remaining 867 bales were completely submerged in sea water, the silk discolored and damaged, and there was great difficulty in unloading said bales from the ship on account of heat and offensive fumes resulting from being so submerged (*Rec.* 400, 401). They were, however, unloaded on the platform of the dock at Tacoma on the 11th and 12th days of Aug-

ust; but were never received into the railroad carrier's warehouse where goods to be forwarded were, in the ordinary course of business, received (*Rec.* 340). On account of the wet and heating condition of the bales on the dock, the Railroad's Freight Agent in charge of the local office and the docks, deemed the 867 bales to be unfit for transportation without first being reconditioned (*Rec.* 349), and one James Ayton, a Cargo Inspector, after making an examination, made a written report condemning the goods as being unfit for transportation without being reconditioned (*Ex.* 21; *Rec.* 652). Thereupon, Frank G. Taylor, assuming to act as a representative of the underwriters and owners of the goods, took possession of 867 bales (*Rec.* 105), and made a contract with the Pacific Oil Mills Company, whereby that Company undertook to dry the silk waste by opening the bales and spreading the waste on clean lumber or hanging the same on lines and drying in the open air, and, after drying, to rebale in such packages and in such manner as would be acceptable to the Railroad, and in such manner as would not increase the freight rate as applied to the original packages, for a compensation of $5,000, and that contract was fully carried out (*Rec.* 640; *Ex.* 1-A).

The process of reconditioning consumed several months of time, so that the last of the 867 bales were delivered at Providence on the 30th day of January, 1919 (*Rec.* 431).

Previous to making that contract, Taylor, in company with one Cheney, who was Chief Clerk in charge of the dock office, viewed a portion of the bales in their damaged condition, being the first

lot from the ship's hold (*Rec.* 91, 337), and Taylor inquired of Cheney if it would be possible to forward the damaged silk by silk train service and asked him if it could go in refrigerator cars; to which questions Cheney answered in the affirmative (*Rec.* 80). Taylor then asked him what it would cost to send them by silk train service and was told that it would be $7.50 per 100 as against $1.75 for the bill of lading weight, and that the cost of refrigerating—the icing and keeping the bales wet while on the wharf and en route—would be $21 per car (*Rec.* 81); and between them it was arranged to have a man go there and hose it down (*Rec.* 81); and it is claimed on the part of defendant in error that this conversation constituted a contract binding upon the railroad carrier, to complete the service of transportation of the 867 bales while in damaged and abnormal condition.

The 1,000 bales were insured by the Atlantic Mutual Insurance Company against loss or damage in transit from Hong Kong to Providence (*Rec.* 20) and the defendant in error received on account of such insurance, February 6th, 1919, $50,000, and on March 7th the further sum of $25,000, and on March 12th, a final payment of $27,052.96, and the defendant in error gave the said Insurance Company receipts for said payments "as a loan pending collection of proceeds of loss on 868 bales of silk waste, ex Steamer 'Canada Maru,' refund of the loan to be made to said Insurance Company out of the proceeds of the collection specified" (*Ex.* 29; *Rec.* 661).

The consignees named in the bills of lading are New York bankers, who paid the purchase price for the silk to the Chinese vendor by commercial letters

of credit, whereby payment was due four months after the date of the shipment from Hong Kong (*Rec.* 127). The bills of lading were endorsed by the bankers for delivery of the goods to the defendant in error upon trust receipts given by the defendant in error, guaranteeing that the goods belonged to said bankers until paid for, and the payments were made four months after the date of the shipment (*Rec.* 127, 128).

The amount of the damages sued for, including the $5,000 paid for reconditioning, was $75,869.62, which, by an amendment on the trial, was increased to $105,622.90 (*Rec.* 5).

STATEMENT OF ISSUES

The defendant in error is not suing as assignee of a right of action for breach of a carrier's contract.

The complaint is in six paragraphs, the first two of which state formal and jurisdictional facts.

The first controverted allegation of the complaint is in the third paragraph in the words following:

> "That said consignees named in said bills of lading did, for a valuable consideration, and prior to the arrival of said silk at Tacoma, Washington, endorse said bills of lading to the plaintiff, and the plaintiff thereupon became the owner of said bills of lading and the said silk and became entitled to the delivery of said silk as provided in said bills of lading."

This is a plea of title and absolute ownership of the silk and that plea is denied by the answer.

The fourth paragraph of the complaint, after reciting arrival of the ship at Tacoma, and the facts

as to the wet condition of 867 bales, alleges that the 1,000 bales were

> "delivered into the possession of the defendant for transportation to destination as aforesaid under and in pursuance of the terms of said bills of lading. That defendant accepted all of said silk for transportation, and, in consideration of the freight prepaid to his agent as aforesaid, the defendant agreed to transport the same to destination as aforesaid. * * * but that the defendant, after accepting said 867 bales of wet silk for transportation, failed and refused to transport said bales of wet silk to their destination, but demanded that said silk be dried and reconditioned before defendant transported the same to destination, all contrary to the terms and requirements of his contract of carriage aforesaid" (*Rec.* 3, 4).

These allegations are denied by the answer.

The fifth paragraph of the complaint alleges that, in order to have the wet bales transported, and without waiving any of its rights, the plaintiff "did cause said wet silk to be treated and reconditioned as required and demanded by the defendant, and thereby incurring an expense of $5,000" (*Rec.* 4, 5).

The answer makes an issue as to any waiver of rights, as to any requirement or demand on the part of the plaintiff in error and as to the amount of expense for whatever was done in treating and reconditioning the silk waste (*Rec.* 10).

The sixth paragraph alleges:

> "That as the natural and proximate result of the drying and reconditioning of said wet silk, the colors of said silk became fixed and permanent and the silk was otherwise damaged and

> the delivery of same at destination was greatly delayed, thereby causing great loss and damage to plaintiff. That, by reason of the wrongful failure and refusal of the defendant to transport said silk in the condition in which defendant accepted the same for transportation and agreed to transport the same as aforesaid, the plaintiff has been damaged in the sum of $100,622.75, in addition to the sum of $5,000 expended by the plaintiff in drying and reconditioning the said silk, making a total damage to the plaintiff of $105,622.90 (*Rec.* 5).
>
> That the defendant has wholly failed and refused to pay the plaintiff any part of said sum, although demand therefor has been made (*Rec.* 5.)

The answer admits failure to pay the damage claimed and denies all other allegations of that paragraph (*Rec.* 10).

For his defense, the plaintiff in error filed a plea in abatement (*Rec.* 7), alleging that the defendant in error is not the real party in interest which is prosecuting this action, for that the property damaged was insured against loss while in transit, and the defendant in error had, previous to commencing the action, received from the Atlantic Insurance Company of New York, the insurer, full compensation for the damage, and setting forth that provision in the bills of lading entitling the railway carrier to the benefit of any insurance that may have been effected upon or on account of the property, and that the defendant in error, as a mere volunteer and in collusion with the Insurance Company, commenced and prosecutes the action for the sole benefit of said insurer, and that if a judgment for any amount of money should be rendered, the same would inure to the insurer.

The answer to the complaint also contains three affirmative defences, the first of which, after quoting from the bill of lading contracts the clause exempting the railroad carrier from liability for loss, damage or delay, alleged the facts as to the condition of 867 bales and the unfitness thereof for transportation in a wet condition at the time when the same were discharged from the ship, and alleged that the only delay in performing the transportation service pursuant to the contracts contained in said bills of lading occurring subsequent to the unloading of said silk waste from the "Canada Maru," was due to the necessary and unavoidable stoppage of said property in transit because of the defect and vice in the property due to the marine disaster (*Rec.* 11, 12).

The second affirmative defence, after quoting the clause in the bill of lading contracts entitling the railroad carrier to the benefits of any insurance effected, alleged that the goods were insured by the Atlantic Insurance Company and that full compensation for the damage had been paid by the insurer (*Rec.* 12, 13).

The third affirmative defence is a plea of estoppel, on the ground that, because of the unfitness of the 867 bales for transportation, when discharged from the ship, the defendant in error withdrew the 867 bales from the carrier's possession for the purpose of being dried and reconditioned, so that whatever damage, if any, was caused by the process of reconditioning, was the result of the plaintiff's own conduct and treatment of the goods (*Rec.* 13, 14).

The reply admits that the bill of lading contracts contained the provisions alleged in the

answer, admits that the goods were insured, and admits that the insurer paid a certain sum of money which is claimed to have been a loan and not in discharge of the insurer's obligation; and admits that the defendant in error caused the wet bales to be reconditioned before the transportation thereof to destination, but makes formal denials of the other matter affirmatively pleaded in said defences.

Questions for decision:

The first question which the Court is called upon to decide is, whether or not the defendant in error is the real party in interest, and, as such, entitled to maintain the action for the causes set forth in its complaint.

The second question is, whether or not the facts alleged in the complaint amount to a breach of the bill of lading contracts.

The third question is kindred to, but different from, the second, namely:—Do the facts proved by the evidence constitute a breach of the bill of lading contracts or any contract alleged in the complaint?

An incidental question, upon which the major question as to the carrier's liability may be hinged, is:—Did the plaintiff in error become bound to accept and transport the 867 bales by any contract other than, or different from, that contained in the bills of lading?

Another incidental question, kindred to the first, is, whether or not the defendant in error, by reason of the ownership of the goods, or as assignee, ac-

quired or ever had any right of action arising out of the contract sued on.

Unless the Court shall reach a conclusion adverse to the contentions of the plaintiff in error, the litigation will be determined by the decision of the foregoing questions; otherwise, the Court may have to determine the amount of damages.

ASSIGNMENTS OF ERROR

The plaintiff in error relies upon, and will discuss, all of the assignments of error, which are as follows:

Assignment of Error No. I.

The Court erred in admitting and considering the following irrelevant and incompetent testimony:

In the deposition of Arthur D. Little, page 109 of the defendant's bill of exceptions, the following question was propounded by counsel for the plaintiff:

> "To a person having experience in handling commodities and cargoes ordinarily shipped on railroads in the United States, is there any reasonable justification for assuming that because a cargo of Canton silk waste which has been wet with sea water is heating to a certain degree and giving off ammonia—in assuming that the cargo is dangerous or liable to spontaneous combustion if transported,"

and to that question the counsel for the defendant objected, on the ground that it called for an opinion as to the ultimate facts to be passed upon by the Court, and did not call for an opinion upon a matter provable by the testimony of an expert witness, and

on the further ground that the witness is not qualified to testify as an expert in answer to that question.

To which question the witness made the following answer:

> "In my opinion, there is none, both for the reason that silk waste is well known not to be subject to spontaneous combustion, and for the further fact that the ammonia evolved is in itself an efficient fire extinguisher."

and the defendant excepted to the ruling of the Court admitting said answer in evidence, and his exception was allowed.

And in the same deposition the following question was propounded by counsel for the plaintiff:

> "I show you a pamphlet entitled:
>
> 'INTERSTATE COMMERCE COMMISSION REGULATIONS FOR THE TRANSPORTATION OF EXPLOSIVES AND OTHER DANGEROUS ARTICLES BY FREIGHT,' dated September —, 1918, page 49 thereof, article 1801, regarding 'Forbidden Articles.' Subsection (d) reading as follows:
>
> 'Rags or cotton waste oily with more than 5 per cent of vegetable or animal oil, or wet rags, or wet textile waste, or wet paper stock,'
>
> and ask you whether Canton steam silk waste could properly or reasonably be classified under any of these words?"

and to that question the defendant objected, and notwithstanding his objection, the witness was permitted to answer.

And to that question the witness made the following answer:

> "It is certainly not to be classified as rags or cotton waste oily with more than five per cent of vegetable or animal oil, since the Canton steam silk waste contains practically no oil and has moreover not been processed in any such sense as rags or cotton waste. Neither can it be classified as wet rags or wet paper stock, nor as wet textile waste for the reason in the latter case that it bears the same relation to cotton or other textile waste that raw cotton or cotton linters bear to the waste of the textile mill. It is, in fact, although called a waste, a valuable and well recogniezd raw material for an important manufacture."

and to the admission of said testimony the defendant excepted, and his exception was allowed by the Court.

And in the same deposition the following question was propounded by counsel for the plaintiff:

> "Whether or not a freight claim agent of such a road ought to have known the commodity known as Canton steam silk waste with its relation to the possible danger of spontaneous combustion?"

and to that question the defendant excepted for the reason that it calls for an opinion upon a man's mentality; but, notwithstanding said objection, the witness was permitted to answer.

To the above question the witness made the following answer:

> "Canton steam silk waste is a commodity of such well known character and frequent shipment and commercial value that those engaged in its transportation, and particularly the freight agents of trans-continental railroads, by which such material is commonly transported, might, it seems to me, in my opinion, be proper-

> ly assumed to possess the general knowledge of its properties and characteristics as regards any tendency to spontaneous combustion. In other words, they should know that it is commonly recognized that it has no such tendency."

and to the admission of that testimony the defendant excepted and his exception was allowed by the Court.

And in the deposition of Edward A. Barrier, defendant's bill of exceptions, page 123, the following question was propounded to said witness by counsel for the plaintiff:

> "Assume the facts that I have stated in my hypothetical question up to the time that the bales of silk were unloaded on the wharf, and assume that they were wet down with a hose and that approximately one-half of the cargo had been loaded in refrigerator cars, and that the assistant freight claim agent of the defendant railroad, the Chicago, Milwaukee & St. Paul, had at that time directed that the silk be unloaded from the refrigerator cars and that it be not shipped unless it was first frozen or dried—whether or not such claim agent would have been reasonably justified in assuming that the wet silk waste was a dangerous commodity to be transported and liable to spontaneous combustion?"

and to that question the defendant excepted, on the ground that it calls for the conclusion of the witness upon ultimate facts and relates to an opinion in relation to the facts which do not involve technical knowledge or the knowledge of an expert, and, therefore, the witness is incompetent to testify as to such matters. But, notwithstanding said objection, the witness was permitted to answer as follows:

> "I do not consider that the freight agent would be justified in taking that action. I might say that my reason for that is this: That I believe that a man whose duties are to pass on such important questions as that should be familiar at least with the general properties of the materials with which he is dealing, and the properties of raw silk with reference to the possibility of spontaneous ignition, such as are generally known among those that are qualified to give information on the subject, can be easily obtained."

and to that answer the defendant excepted and his exception was allowed by the Court.

And the following question was propounded to the same witness by counsel for the plaintiff:

> "Is the fact that a commodity of animal or vegetable origin heats from fermentation, alone reasonable ground for assuming that it is a dangerous commodity to transport or that it is liable to spontaneous combustion?"

and to that question the defendant objected, on the ground that it called for an opinion on the ultimate facts and not an opinion relating to anything which calls for technical knowledge. Notwithstanding said objection the witness was permitted to answer.

To the above question the witness made the following answer:

> "I should say not. The railroads are regularly transporting material which is subject to heating which does not ignite spontaneously."

and to the admission of that testimony the defendant excepted, and his exception was allowed by the Court.

And in the deposition of Harry Albert Mereness,

defendant's bill of exceptions, page 200, the following question was propounded to said witness by counsel for the plaintiff:

> "Assume further that when the silk waste had first been discharged from the vessel, it had heated to some extent and that it had been wet down by hose, and that on August 15th and 16th the heating had reduced and that in some bales it had disappeared entirely; that ammonia fumes were coming off—whether or not, under those conditions, there would have been reasonable grounds for assuming that there was any danger from spontaneous combustion in transporting the cargo in refrigerator cars iced across the continent?"

and to that question the defendant objected, on the ground that the question is incompetent, immaterial and irrelevant, and the witness is not competent to give his opinion on the subject, and it calls for an opinion on a subject which an expert is incompetent to give, and it is the conclusion of a given state of facts which the jury or Court must pass upon. But, notwithstanding said objection, the witness was permitted to answer the question.

To the foregoing question said witness made the following answer:

> "Under the conditions that you have outlined, I have no reason to believe that there would be any danger due to spontaneous combustion in shipping this cargo."

and to that testimony the defendant excepted, and his exception was allowed by the Court.

Assignment of Error No. II:

At the conclusion of the trial and after the argument by counsel for the plaintiff and defendant respectively, the cause was taken under advisement by the Court, and, in due time, before the rendition of the Court's decision, the defendant submitted in writing proposed findings of fact and conclusions of law, and requested the Court to make findings and conclusions accordingly, including the following:

> "On the 30th day of July, 1918, the 'Canada Maru,' with said 1,000 bales on board, met with a maritime disaster by striking on rocks and stranding on the coast of Washington near Cape Flattery, and said vessel was thereby so badly damaged that her hold and cargo space were filled with sea water and eight hundred and sixty-seven (867) of said bales were completely submerged in the hold of said vessel."

and to make said findings the Court refused, and to the ruling of the Court, in refusing to make said findings, the defendant at the time excepted, and said exception was allowed by the Court.

Assignment of Error No. III:

Defendant also requested the Court to make a finding as follows:

> "Said vessel was rescued from her perilous position and towed to Tacoma, where she arrived on the 10th day of August, 1918, and from thence proceeded to a dry dock for necessary temporary repairs before commencing to discharge cargo. After returning to Tacoma she commenced discharging said bales of silk on

> the 12th day of August, and completed discharging said bales on the 16th day of August, 1918."

and to make said finding the Court refused, and to the ruling of the Court in refusing to make said finding the defendant excepted, and his exception was allowed by the Court.

Assignment of Error No. IV:

And defendant also requested the Court to make a finding as follows:

> "When discharged from said vessel, one hundred thirty-three (133) of said bales were found to be undamaged and the same were promptly transported to destination. The other 867 bales were completely saturated with sea water, whereby heat and malodorous fumes emanated therefrom to such an extent that the stevedores were able only with great difficulty to remove the same from the hold of said vessel, and, after being unloaded on the dock, heating and diffusion of malodorous fumes continued, to such an extent that, after inspection by a Cargo Surveyor, said 867 bales were, by agents of the Chicago, Milwaukee & St. Paul Railway Company and said Cargo Surveyor, deemed to be dangerous to handle, dangerous to carry by railway from Tacoma to Providence, and unfit for transportation without being reconditioned."

and to make said finding the Court refused and to the ruling of the Court in refusing to make said finding the defendant excepted, and said exception was allowed by the Court.

Assignment of Error No. V:

And the defendant also requested the Court to make a finding as follows:

> "All of said 1,000 bales were insured against damage in transit from Hong Kong to Providence by the Atlantic Mutual Insurance Company; and during the time of the unloading of the said bales from said vessel, Frank G. Taylor, representing the Underwriters, by direction of the Atlantic Mutual Insurance Company, visited the premises where said wet bales were, for the time being, situated, and became informed as to the condition thereof, and, after being definitely informed by the Agents of the Chicago, Milwaukee & St. Paul Railway Company that the same were deemed to be unfit for transportation and that said Railway Company would not assume the risk of transporting the same from Tacoma in their wet condition, caused said wet bales to be removed from Tacoma to Seattle for the purpose of being reconditioned by drying the same and entered into a contract with the Pacific Oil Mills, at Seattle, to perform the service of drying and rebaling the contents of said bales after being dried and redelivering the same, which contract was performed by said Pacific Oil Mills, and for said service said Taylor paid Five Thousand ($5,000.00) Dollars."

and to make said finding the Court refused and to the ruling of the Court, in refusing to make said finding the defendant excepted, and said exception was allowed by the Court.

Assignment of Error No. VI:

And defendant also requested the Court to make a finding as follows:

> "That the time consumed in completing said

operation of drying extended until the 20th day of January, 1919."

and to make said finding the Court refused, and to the ruling of the Court in refusing to make said finding the defendant excepted, and said exception was allowed by the Court.

Assignment of Error No. VII:

The defendant requested the Court to find and include in its findings of fact the following:

"That, after being reconditioned as aforesaid, all of the contents of said 867 bales were, by the Chicago, Milwaukee & St. Paul Railway and connecting lines, transported from Seattle to, and delivered at, Providence, Rhode Island, that service being completed on the 30th day of January, 1919."

To make such finding the Court refused, and to the ruling of the Court in refusing to make said finding the defendant excepted, and said exception was allowed by the Court.

Assignment of Error No. VIII:

The defendant also requested the Court to make a finding as follows:

"On the security of letters of credit all of said 1,000 bales were sold by the manufacturers in China on a credit of four (4) months from the date of shipment thereof from China; the consignees aforesaid, without receiving immediate payment of the purchase price for said merchandise, at the time of delivering said bills of lading to the plaintiff, took from said plaintiff a trust receipt, in effect stipulating that said merchandise belonged to said consignee until the purchase price aforesaid should be paid,

which payment was made at the time of, and not before, the expiration of said four months period of credit, which was on or about October 24th, 1918, and at that time, by said payment, the plaintiff acquired ownership of said merchandise."

To make said finding, the Court refused, and to the ruling of the Court in refusing to make said finding, the defendant excepted, and said exception was allowed by the Court.

Assignment of Error No. IX:

The defendant also requested the Court to make a finding as follows:

"In whatever way said merchandise became damaged or diminished in value, subsequent to the unloading thereof from the 'Canada Maru,' such damage or impairment of value occurred and was fully consummated during the time intervening between the 12th day of August and the 24th day of October, 1918, during which time the consignees, Heidelbach, Ickelheimer & Co. and Goldman, Sachs & Co., named respectively in said bills of lading, were owners of said merchandise."

To make said finding the Court refused, and to the ruling of the Court in refusing to make said finding, the defendant excepted, and said exception was allowed by the Court.

Assignment of Error No. X:

The defendant also requested the Court to make a finding as follows:

"The market value of the silk waste contained in said 867 bales, on arrival at Providence in the due and ordinary course of transportation,

> if then undamaged, would have been $125,-653.78; that gross sum being arrived at by computation of the market value of two grades of silk waste, No. 1 grade being at the rate of $1.51 per pound, of which there was 46,613 pounds, and No. 2 grade at $0.87 per pound, and there is a total failure on the part of plaintiff to introduce any evidence respecting the weight of the silk of said No. 2 grade; and there is a total failure on the part of the plaintiff to prove the difference in market value between the sound value—viz.: $125,653.78—and the market value of said merchandise at the time of its delivery at Providence in the state it was after being reconditioned as aforesaid."

The Court refused to make said finding, and to the ruling of the Court in refusing to make said finding, the defendant excepted, and said exception was allowed by the Court.

Assignment of Error No. XI:

And the defendant also requested the Court to make a finding as follows:

> "That in the months of February and March, 1919, The Atlantic Mutual Insurance Company paid the plaintiff sums of money aggregating Seventy-seven Thousand, Seven Hundred Fifty-two and 96-100 Dollars, and there is a total failure on the part of plaintiff to prove that any damage by deterioration of said merchandise, or expenses chargeable as a loss incidental to the transportation thereof, amounts to any sum in excess of said $77,752.96 paid by said Insurance Company as aforesaid, whereby the plaintiff, previous to the commencement of this action, received full compensation for whatever loss or damage it may have sustained in con-

nection with the transportation of said merchandise."

The Court refused to make said finding, and to the ruling of the Court in refusing to make said finding, the defendant excepted, and said exception was allowed by the Court.

Assignment of Error No. XII:

And the defendant requested the Court to make a finding as follows:

> "The defendant did not make, or enter into, any agreement for transportation of said 867 bales while in the wet condition in which they were discharged from the 'Canada Maru,' or any agreement whatsover respecting the transportation of said merchandise other than, or different from, the written contract contained in said four bills of lading, nor at any time accept said 867 bales, or any part thereof, for transportation without being reconditioned."

To make said finding, the Court refused, and to the ruling of the Court in refusing to make said finding, the defendant excepted, and said exception was allowed by the Court.

Assignment of Error No. XIII:

The defendant also requested the Court to make a finding as follows:

> "The defendant did not, by any act or omission, cause, or contribute to the cause of, any damage whatever or impairment of value of said merchandise, or any part thereof, or in any manner fail to fully and completely perform his contract for that part of the transportation by his Railroad."

The Court refused to make said finding, and to the ruling of the Court in refusing to make said

finding, the defendant excepted, and said exception was allowed by the Court.

Assignment of Error No. XIV:

The defendant requested the Court to include in its conclusions of law the following:

> "The plaintiff herein is not the real party in interest nor entitled by law to maintain this action,"

which request was refused by the Court, and to the ruling of the Court in refusing to make said finding, the defendant excepted, and said exception was allowed by the Court.

Assignment of Error No. XV:

The defendant requested the Court to make as a conclusion of law the following:

> "The defendant is not, by any act or omission, guilty of any breach whatever of the contract sued on herein,"

which request was refused by the Court, and to said refusal the defendant excepted, and said exception was allowed by the Court.

Assignment of Error No. XVI:

And the defendant requested the Court to make as a conclusion of law the following:

> "The defendant is entitled to have a judgment in his favor that the plaintiff take nothing by its action herein."

The above request was refused by the Court, and to the ruling of the Court in refusing to make said finding, the defendant excepted, and said exception was allowed by the Court.

Assignment of Error No. XVII:

The Court made findings of fact and conclusions of law in writing, including the following, contained in paragraph Three of said findings of fact:

> "That 500 bales were of the quality known as 'No. 1 Canton Steam Waste Silk' and 500 bales were of the quality known as 'No. 2 Canton Steam Waste Silk';"

which the defendant assigns for error for the reason that no evidence was introduced upon the trial indicating the number of bales of the qualities known as No. 1 and No. 2 Canton Steam Silk Waste.

Assignment of Error No. XVIII:

Paragraph numbered VIII of the Court's findings includes the following:

> "That on July 30, 1918, and during the time said bales of waste silk were in the course of transportation on said S. S. Canada Maru under the said bills of lading, said vessel stranded and large quantities of salt water entered her holds, and as a result 500 bales of waste silk known as 'Canton Steam Waste Silk No. 1' and 367 bales of said waste silk known as 'Canton Steam Waste Silk No. 2' became wet from the contact with the salt water,"

which finding the defendant assigns for error, for the reason that no evidence was introduced upon the trial indicating the number of bales of the qualities of No. 1 and No. 2 Canton Steam Silk Wastes.

Assignment of Error No. XIX:

Paragraph numbered Nine of the Court's findings of fact includes the following:

> "That after the vessel had commenced dis-

charging the wet silk, Mr. Taylor, the representative of the underwriters and owners thereof, called on Mr. Cheney, the Chief Clerk of the Freight Agent at Tacoma, and who was in charge of the dock and the movement of freight therefrom, and told Mr. Cheney that he was very anxious to have quick dispatch of the wet silk, and that it was important that it should go forward in its wet condition. Cheney and Taylor looked at the silk as it was being discharged from the vessel and placed on the dock, and Taylor requested that it be forwarded by silk train service in refrigerator cars, and Cheney agreed to so forward it, stating that the cost of such service would be $7.50 per hundred pounds as against the bill of lading freight of $1.75 per hundred, and that there would be an additional charge for refrigeration of approximately $21.00 per car to pay, all of which Taylor agreed to.

On August 14th, Taylor again called on Cheney to see how the matter was progressing, and he and Cheney again examined the silk, and Taylor was told by Cheney that the cars had been ordered and would be brought in shortly, and thereafter the cars were brought in, and approximately one-half of the wet silk bales were loaded on two or more refrigerator cars for shipment,"

which finding the defendant assigns for error, for the reason that no evidence was introduced upon the trial tending to prove that the person named "Cheney," referred to in said findings, was in charge of the dock or the movement of freight thereupon, or that he had any authority to make or enter into any agreement respecting the transportation of freight, and for the further reason that the uncontradicted evidence in the case and all the evidence upon that point proves affirmatively that said Che-

ney did not have any authority whatever to make, or enter into, any agreement respecting the transportation of freight, and, for the further reason, that by the Interstate Commerce Law railroad carriers are strictly prohibited from entering into special contracts, or special service at special rates, for the transportation of freight and for the further reason that Taylor did not, in fact, pay, or tender payment, or make any promise binding upon the plaintiff to pay extra charges for the services required for transportation of 867 bales by silk train, or the extra charge for transportation of said bales in refrigerator cars, and for the further reason that said finding does not include the requirement by Taylor for sprinkling or drenching said wet bales so as to keep them continuously wet during the time of transit to destination.

Assignment of Error XX:

The Court erred in making the finding numbered as paragraph X, for the reason that said finding is not true, is not supported by any evidence whatever, and is contrary to all the evidence bearing upon the question as to the making of a special contract for transportation of 867 bales in their wet condition.

Assignment of Error No. XXI:

The Court erred in making the finding contained in paragraph thereof numbered XI, for the reason that the same is not true, is not supported by any evidence, and all the evidence proves affirmatively that the wetting of said 867 bales generated heat and caused diffusion of offensive fumes so that the same were difficult to handle, liable to cause

spontaneous combustion and fire while confined in freight cars and were totally unfit for transportation without being reconditioned; and for the further reason that the Court's finding that transportation of said bales while in a wet condition was not prohibited by any regulation of the Interstate Commerce Commission, is immaterial.

Assignment of Error No. XXII:

The Court erred in its findings of fact in paragraph numbered XII, that the reasonable costs and expense of drying said bales was Five Thousand ($5,000) Dollars, which sum plaintiff paid therefor, for the reason that no evidence was introduced upon trial to support a finding as to the reasonable costs and expense of drying said bales, and there was no evidence tending to prove that the plaintiff paid said sum of Five Thousand ($5,00) Dollars, or any part thereof. And the evidence proves affirmatively that whatever sum was paid for drying said bales was paid by Frank Taylor, the representative of the Insurers.

Assignment of Error No. XXIII:

The Court erred in making the following finding, included in paragraph numbered XII, that the plaintiff, in taking possession of said 867 bales of wet waste silk for the purpose of drying it, did so without relinquishing any part of plaintiff's rights in the premises, for the reason that there was no evidence introduced upon trial tending to prove that there was any reservation of rights in behalf of any party in taking possession of 867 bales for the purpose of reconditioning the same.

Assignment of Error No. XXIV:

The Court erred in making the finding contained in paragraph numbered XIII, that the natural and proximate result of the drying of said bales was a weakening of the fiber and a discoloration of said waste silk, for the reason that there was no evidence introduced upon the trial tending to prove that the drying of said bales had any tendency to weaken the fiber or cause discoloration of said waste silk, and said finding is not true, and all the evidence in the case proves that the damage to 867 bales was entirely due to the wetting thereof.

Assignment of Error No. XXV:

The Court erred in making the finding contained in paragraph thereof numbered XIII, that upon arrival of said 867 bales of waste silk at destination, a reasonable, fair market value thereof was the sum of Fourteen Thousand Eight Hundred Fifteen and 67-100 ($14,815.67) Dollars, for the reason that there was no evidence introduced upon the trial tending to prove the market value of said bales on arrival at destination, or that said market value was not in excess of the sum aforesaid.

Assignment of Error No. XXVI:

The Court erred in making the finding contained in paragraph numbered XIV of its findings of fact, for the reason that no evidence was introduced upon the trial that 500 bales or any number of bales of wet silk were of the grade known as No. One (1) nor that the market value of said bales of No. 1 was Ninety-five Thousand Three hundred ninety-four and 25-100 ($95,394.25) Dollars less ten per cent (10%), nor that the market value of the bales

of No. 2 quality was Forty Thousand Three Hundred Forty-two and 27-100 ($40,343.27) Dollars, less ten per cent (10%), nor that the total value of said 867 bales was One Hundred Twenty-two Thousand One Hundred Sixty-three and 32-100 ($122,163.32) Dollars, and said finding is not true and all of the evidence in the case proves that the quantities and value of 867 bales was One Hundred Thirteen Thousand Eighty-eight and 40-100 ($113,088.40) Dollars.

Assignment of Error No. XVII:

The Court erred in making the finding contained in paragraph numbered XV of its findings of fact, for the reason that no evidence was introduced upon the trial tending to prove that the amount payable by the plaintiff for extra service required in transportation of said 867 bales to destination in their wet condition was Six Thousand Seven Hundred Twenty-four and 75-100 ($6,724.75) Dollars, and said finding is not true because the uncontradicted evidence proves that the tariff of rates on file with the Interstate Commerce Commission made no provision fixing any rate for such or similar extra service and any special contract or special rate for extra service was and is contrary to law.

Assignment of Error No. XXVIII:

The Court erred in its findings contained in paragraph thereof numbered XVI, for the reason that no evidence was introduced upon the trial tending to prove that the amount of the plaintiff's damages was One Hundred Five Thousand Six Hundred Twenty-two and 90-100 ($105,622.90) Dollars, or any amount whatever, and the same is not true, and the plaintiff was not damaged in any sum what-

ever, caused by any act, omission or failure on the part of the defendant to fully perform the contract undertaken and covered by the bills of lading.

Assignment of Error No. XXIX:

The Court erred in its findings of fact contained in paragraph thereof numbered XVII, that all or any part of the money paid to the plaintiff by the Atlantic Mutual Insurance Company was a loan, for the reason that all of the evidence introduced upon the trial, relating to said payment, proves that said payment was made without any obligation on the part of the plaintiff to repay the same, or any part thereof, except whatever sum might be collected from the defendant, and that the payment made extinguished the liability of the Atlantic Mutual Insurance Company as an insurer of the shipment of silk.

Assignment of Error No. XXX:

The Court erred in its conclusions of law in paragraph thereof numbered I, for the reason that by the uncontradicted evidence introduced upon the trial, it was proved that the plaintiff is not the real party in interest in prosecuting this action, but commenced and maintained the same for the sole benefit of the Atlantic Mutual Insurance Company, and the uncontradicted evidence and all of the evidence introduced on the trial proved that the plaintiff was not the owner of 867 bales at the time when the same were damaged.

Assignment of Error No. XXXI:

The Court erred in its conclusions of law contained in paragraph numbered II, for the reason there was no contract between Cheney and Taylor for the

movement of 867 bales, that Cheney was not an authorized agent to make any contract binding on the defendant with respect to the transportation of freight, and if such contract had been formally made, it would have been unlawful and unenforcible because expressly forbidden by the provisions of the Interstate Commerce Law.

Assignment of Error No. XXXII:

The Court erred in its conclusions of law contained in paragraph numbered III thereof, for the reason that the same is contrary to the facts proved on the trial and contrary to the law.

Assignment of Error No. XXXIII:

The Court erred in rendering the judgment against the defendant, for the reason that the findings of fact as made and signed by the Court are insufficient to justify the conclusions of law and insufficient to support said judgment.

Assignment of Error No. XXXIV:

The Court erred in rendering a final judgment in this action, for the reason that instead of being in favor of the plaintiff, the right judgment should have been in favor of the defendant.

WHEREFORE, the defendant prays the United States Circuit Court of Appeals for the Ninth Circuit for a review of this action, pursuant to the writ of error to be sued out herein and to reverse the final judgment of the District Court for the Western District of Washington, Southern Division.

ARGUMENT

The assignments of error are sufficiently specific to present for consideration all of the important questions for decision as above stated, and a discussion of those questions will comprehend all of the assignments of error. Therefore, it will be the most satisfactory way of arguing the case to take those questions in the order stated.

I.

The plea in abatement states facts sufficient in law to require an abatement of the action. By what is commonly known as the "Conformity Act," comprised in Section 914, U. S. R. S., the practice in actions at law in the federal court is controlled by the state law. This is an action at law, and by force of Section 179 of Remington's 1915 Code, it is maintainable only by a plaintiff who is the real party in interest; that is to say, the party entitled to receive, retain and enjoy the fruits of a decision in the plaintiff's favor; and Section 189 of the same Code provides that

> "All persons interested in the cause of action, or necessary to the complete determination of the question involved, shall, unless otherwise provided by law, be joined as plaintiffs when their interest is in common with the party making the complaint."

These provisions of the statute are mandatory and in accordance with the fundamental principle that, in order to adjudicate the rights of parties, a court must have jurisdiction over the parties. This case does not come within any exception to the rule requiring presence of the real party in interest; one of the exceptions permits the assignee of

a chose in action to sue thereon, but the assignment, to confer such authority, must be in writing, and one of the facts of this case is, that there is no assignment, or claim of an assignment, of the cause of action.

The real party in interest, within the meaning of the statute is the party who will be entitled to the benefits of the action if the plaintiff prevails; one who is substantially interested in the subject matter as distinguished from one who has only a nominal, formal, or technical interest in, or connection with it.

> *Encycl. of Pl. & Pr.*, p. 710, citing *Black's Law. Dic.*, 997.

In the case of *Marine Ins. Co.* vs. *St. Louis I. M. & S. Ry. Co.*, 41 Fed. Rep., 645, it was held that where an insurer had paid the full value of the property destroyed, the owners of the property had no interest in, and were not necessary parties to, a suit to recover damages against a wrong-doer causing the loss; and it has been held by the Supreme Court of the State of Washington that an action to recover damages for injury to property, by a plaintiff who has received full compensation for the injury, cannot be maintained, the reason given for that decision being, that a plaintiff in that situation is not the real party in interest.

> *Broderick* vs. *P. S. T. L. & Power Co.*, 86 Wash., 399.

In the case of *Palmer* vs. *O-W. R. & N. Co.*, 208 Fed. Rep., 666, insurance companies carrying insurance on a mill which had been destroyed, paid to a co-plaintiff the loss alleged to have been caused by the defendant's tort, and one of the questions decid-

ed was, whether the insurance companies were proper parties in the case. In his decision Judge Cushman said:

> "Under the statutes of the State of Washington and the decisions of its courts, the Insurance Companies are held to be the real parties in interest, *and therefore, necessary parties.*" (Italics added.)

In the litigation of this cause, the real facts and legal rights of the parties must be adjudicated, and the injustice of allowing the plaintiff, who is a mere volunteer, to be used as the instrument of an outsider to carry on the lawsuit, is especially manifest in this case, wherein a demand is made in utter disregard of a stipulation in the contract, which contract is the basis of this action.

In this case the parties agreed that the railroad carrier should have the benefit of insurance against loss or damage to the goods in transit; insurance was effected, not only by the issuance of a policy, but by actual payment of an amount of money covering the amount of loss; payment was made under terms and conditions requiring that whatever money might be recovered by litigation for damages should pass to the insurer instead of being retained by the party prosecuting the action (*Deft's Ex.* 29; *Rec.,* 661).

In this case, were the insurance corporation, for whose benefit the action is being prosecuted, in court as the plaintiff, it would necessarily invoke the law of subrogation; and the issues of fact and law to be determined would be different from and broader than the simple issues in an action to recover damages for breach of a carrier's contract. The manifest purpose in bringing this action in the

name of a party claiming ownership of damaged goods, is to evade the question which must be determined in order to adjudicate the rights respectively of the defendant and the insurer.

II.

A party suing to recover damages for breach of contract is necessarily required to set forth in a pleading the fact that the contract was broken, with particularity as to each act or omission constituting the breach. Here, the contracts are set forth in the documents Exhibits 8, 9, 10 and 11.

There is and can be no controversy with respect to the obligations and duties assumed by the carrier. The substantial part of that obligation was to carry from the landing port on Puget Sound to Providence, Rhode Island, and there deliver, 1,000 bales of silk waste; the carrier being unrestricted with respect to any particular train or cars to be used for the purpose, and unrestricted as to the time of performing the service, except that it was to be with reasonable despatch. The complaint alleges affirmatively that the main purpose of the contract was actually and literally performed, because the goods were carried to, and delivered at, destination. Delay in the performance of that service is all that is charged in the complaint as constituting a breach of the contract. But in the same connection—that is, in paragraph four of the complaint (*Rec.* 4)—facts are stated showing the circumstances which caused the delay, bearing directly upon the question as to whether or not the service was performed with reasonable despatch. It is there alleged that 867 bales were, in consequence of a marine disaster, wet from contact with salt

water; that the defendant refused to transport the bales of wet silk until the same had been reconditioned by drying.

Delays in transportation of merchandise are not unusual, and, by reason of the frequency thereof, shippers and cariers necessarily have to contemplate contingencies that may cause delays, and prudence dictates that their contracts shall be made to express the liabilities, or exemptions from liability, in case of such contingenicies; so we have in the bill of lading contracts an express provision exempting the carrier from liability for delay, under specified circumstances and conditions. By reason of that clause in the contracts, mere delay does not, in and of itself, constitute a breach of the carrier's contract. In view of that exemption clause, the fourth paragraph of the complaint attempts to amend the contract, or to substitute for the written contract a different contract to be implied from acts of representatives of the carrier in accepting the bales for transportation in the wet condition. In this statement we are giving a liberal and broad interpretation to the pleader's allegations, and, even so, the alleged breach by delay was not a failure to perform the contract set forth in the bills of lading, and before the carrier can be held responsible for failure to perform the service according to contract. a new, different and lawful contract must be established.

A breach of contract, to give rise to an action for damages, must necessarily be the cause of actual loss or damage. Therefore, it must be a question to be considered, whether the delay in performing the transportation service was a cause of damage.

On that subject, the sixth paragraph of the complaint alleges (*Rec.* 5):

> "That as the natural and proximate result of the drying and reconditioning of said wet silk, the colors of said silk became fixed and permanent and the silk otherwise damaged and the delivery of same at destination was greatly delayed."

According to that allegation, it was not delay that caused the damage, but, on the contrary, it was the damage, for which the carrier was not responsible, which caused the delay.

We very earnestly insist that this Court shall give consideration to the allegations of the complaint, which the trial court did not do.

The pleader, having chosen the words in which to express the precise charge made against the plaintiff in error, must be conclusively presumed to have intended the charge to mean what the words expressed. The charge here is, that the natural and proximate result of the drying and reconditioning is what caused the damage and delay. Then the question arises, who caused the drying and reconditioning? That refers us back to the fifth paragraph of the complaint in which it is experssly alleged (*Rec.* 4, 5) that "the plaintiff did cause said wet silk to be treated and reconditioned." Now, surely, by any rule of law or reason, can the carrier be held responsible for delay caused by the treating and reconditioning of the goods, which was done by the party complaining of the breach of the contract?

Responsibility for the treating and drying cannot be cast upon the carrier by the allegation in the

fifth paragraph that the treatment was as required and demanded. Requiring and demanding would not affect the responsibility, unless it was capricious and unreasonable, nor, if so, unless the existing circumstances and conditions were such that the requirement amounted to coercion. Now, there is no allegation charging the carrier with having exacted reconditioning that was unnecessary or unreasonable, nor that the plaintiff in the case caused the silk waste to be dried and reconditioned under stress of coercion constituting legal duress.

A result of a fair reading and interpretation of the complaint is, that it does not state facts sufficient to constitute a cause of action for breach of a contract, because the complaint does not specifically, nor by reasonable inferences therefrom, allege that the contracts sued on were broken by failure of the carrier to fully and completely perform the transportation service which the contracts required.

The complaint does not set forth the bill of lading contracts in the words and phrases thereof, but does describe the documents by numbers, dates, etc., sufficiently for identification, so that, for a clear understanding of the duties and obligations of the plaintiff in error thereunder, it is necessary to read them. They are in forms permitted by law in cases of contracts for through transportation from a foreign country to a destination point within the United States to be performed partly by ship and partly by a railway, and, they require the ship to deliver the 1,000 bales to the railway carrier *in good order.*

They are signed on the part of the ship carrier

as a principal contractor and as agent of the railway carrier, and are in two parts as distinct contracts, each containing distinct sets of terms and conditions—the first relating exclusively to the transportation by ship, and the second, to the land carriage, to begin when the goods should be delivered in apparent *good order* to the railway carrier, The two contracts are as distinct as they would be if contained in separate documents.

Liverpool, etc., Co. vs. *Phoenix Inc. Co.*, 129 U. S., 397, 463:

Pacific Mail Steamship Co. vs *Ry.*, 251 Fed. Rep., 218, 221:

C. N. O. & T. P. Ry. vs. *Fairbanks & Co.*, 90 Fed. Rep., 467; Rule 71 I. C. C., Tariff Circular 18-a.

The case is the same as if instead of a ship to bring the commodity to the place where the railway service was to begin, the shipper had employed a team to bring the bales from a distant place to that point. As in all contracts for future service made by an agent, the obligation of the railway carrier attached at the time of delivery to it of the goods, in the condition specified in the contract. In other words, a railway carrier having contracted to carry merchandise to be delivered to it *in good order* is not by such contract bound to carry the goods if delivered to it in bad condition, unless the same is first reconditiioned.

Paramore vs. *Ry.*, 53 Ga., 383;

Gulf, etc., Ry. vs. *Frank*, 48 S. W. Rep., 210 (Tex.);

Tilley vs. *Ry.*, 77 S. E. Rep., 994 (N C.)

There is no claim or pretense that the railway carrier is to any extent, or at all, responsible for any damage to the silk waste that happened before it was discharged from the "Canada Maru"; the railway carrier's contract, as it was pleaded, *was to receive the shipment—in apparent good order and condition*—carry it with reasonable despatch—and deliver it at destination "in like apparent good order and condition." By affirmative allegations of the complaint, in the fourth and fifth paragraphs thereof, it appears distinctively and positively that 133 of the bales were received, forwarded and delivered at destination *in due course,* and, the other 867 bales after being reconditioned by the defendant in error, were also carried to and delivered at destination; so that, the complaint itself shows affirmatively that the plaintiff in error did perform his duty stipulated for in the bill of lading contracts in every detail thereof, and no right of action accrued by any breach of either of said contracts.

The case is very simple: no labor to construe or interpret the contracts can be required; being ordinary bills of lading on blanks containing phrases and stipulations familiar to shippers and carriers and free from ambiguities, construction is not required nor permissible. By their express provisions they bar any recovery in two ways: *First,* negatively, in that they do not impose on the carrier a duty to transport silk waste while it is in a wet, heating, offensive and dangerous condition; and, *second,* affirmatively, in that the exemption from liability-for-delay clause therein means that no right to damages could accrue for delay during the time in which the goods were held in the shipper's possession for the purpose of restoring it to a con-

dition fit for transportation. There is no other contract to complicate the case.

The Court's findings of fact, numbered IX, X and XI (*Rec.* 39, 40, 41), are absolutely erroneous, for the reasons that the facts therein stated are not relevant to any issue tendered by the complaint, and all of the evidence on which said findings are based is, for that reason, void. Apparently it was assumed by the trial court that the allegations contained in the fourth paragraph of the complaint allege a supplementary contract. Whether such supplementary contract is so alleged requires that due consideration be given to the words of the pleading, which are as follows:

> That upon the arrival of the S. S. Canada Maru at Tacoma, Washington, during the month of August, 1918, the said bales of silk were discharged from the S. S. Canada Maru and delivered into the possession of the defendant for transportation to destination as aforesaid, under and in pursuance of the terms of the said bills of lading. That defendant accepted all of said silk for transportation and, in consideration of the freight prepaid to his agent, as aforesaid, and of further freight and charges to be paid by the plaintiff, the defendand agreed to transport the wet silk to destination by silk or passenger train service in refrigerator cars as aforesaid." (*Rec.* 4).

That allegation is too vague and indefinite upon which to base a finding that there was a supplemental agreement varying the conditions of the bills of lading. As so alleged, the allegations are inconsistent with each other, the idea of a new agreement being negatived by the statement that the 1,000 bales were delivered for transportation

"under and pursuance of the terms of the said bills of lading." It is not alleged, and it is not the fact, that there was any consideration paid, tendered or promised for the special service for transportation by silk or passenger train service or in refrigerator cars. Such supplemental agreement could not be made without violating Section 6 of the Interstate Commerce Law, which provides:

> "No carrier shall engage or participate in the transportation of passengers or property unless the rates, fares and charges upon which the same are transported by said carrier, have been filed and published in accordance with the provisions of this Act."

The allegation that defendant (plaintiff in error) accepted all of said silk for transportation, in consideration of the freight prepaid and of further freight and charges to be paid by the plaintiff (defendant in error), is insufficient to meet the requirements of law for a valid transportation contract, because the only freight and charges that could be lawfully made must be at the rates and under the conditions prescribed in tariffs on file with the Interstate Commerce Commission. To transport the silk in its wet and damaged condition would require special cars and a special service, which is forbidden by the Interstate Commerce Act. With respect to the service governed by the Act, the parties are not at liberty to alter the terms of the service as fixed by the tariffs in force. There was no tariff on file governing the shipment of such a commodity in such a condition. (See *Exhibits* 26 and 27 of plaintiff in error, the originals of which are on file, being the usual pamphlets filed with the Interstate Commerce Commission, identi-

fied and explained by the witness Brownell (*Rec.* 511 to 517). No carrier can extend any privileges or facilities save as have been duly specified in the tariffs.

Southern Ry. Co. vs. *Prescott*, 240 U. S., 632, 638.

Kirby's Case, 225 U. S. at page 166.

Robinson's Case, 233 U. S., 173, 181.

Southern Express Co. vs. *Byers*, 240 U. S., 612.

The introductory words of finding numbered X are:—"That after thus contracting for, and accepting, said 867 bales of waste silk for transportation as aforesaid,"

To express any meaning whatever, that finding should be corrected and tied on to some contract by the words "thus" and "aforesaid," but the only things in the nature of a contract that precedes, are the bills of lading, and they make no reference whatever to "wet waste silk." If, by the indulgence of imagination, the reference may be understood as adopting the finding numbered IX as if it were an assertion of the making of a contract, it takes us to "no one knows where," for that the ninth finding, instead of stating a contract, is only an imperfect recital of the testimony given by Mr. Taylor.

It appears that Mr. Taylor, acting as a representative of the underwriters and owners, after being informed directly by an officer having the authority of a General Freight Agent, that Mr. Earling, the General Manager, was the only man

who had authority, attempted to conclude an arrangement for special service with Mr. Cheney, who was a mere clerk in the Dock Office. See *Rec.,* pages 80 to 85.)

It is an elementary rule of law that whoever claims rights based on a contract made with an agent, has the burden of proving that the agent had authority to bind his principal in making the contract. There is not, in the testimony offered by the defendant in error, one scintilla of testimony or evidence in anywise tending to prove that Mr. Cheney had authority to bind the plaintiff in error by such a contract or arrangement as testified to by Mr. Taylor, and the evidence to the contrary is, that Mr. Earling, the General Manager, was the only representative of the plaintiff in error and that Taylor was so informed. (*Rec.* 82, 83).

Tilley vs. *Ry.,* 77 S. E. Rep., 994 (N. C.)

Gulf, etc. Ry. vs. *Frank,* 48 S. W. Rep., 210 (Tex);

chandise for transportation in an unfit or abnormal

Such a contract as the Court assumed in the findings above referred to, could not lawfully have been made, nor was it made by anyone authorized to bind the plaintiff in error thereby; and, finally, it was impractical, for reasons given in the testimony of James L. Brown, Superintendent of Transportation (*Rec.* 384 to 387).

The trial court erroneously assumed as a fact that Cheney held the position equivalent in authority to that of a railroad station agent, and erroneously held, as a matter of law, that acceptance at a railroad station, by the station agent, of merchandise for transportation in an unfit or abnormal condition, was equally binding upon the carrier, as

in any case of an ordinary shipment of goods in fit condition for transportation. But such authority cannot be inferred nor implied from the mere position of a railroad station agent.

Gauthier & Son vs. *Director General*, 115 Atl. Rep., 258 (Me.);

Warner vs. *Ry.*, 111 Me., 149.

It is marvelous that the parties who instituted this litigation could have conceived the idea of collecting damages from a railway carrier for an injury to merchandise in transit on board of an ocean carrier by maritime disaster which the Railway Company could never have guarded against or prevented, and for which even the ocean carrier was by law exempt from liability for damages. A bare statement of the proposition condemns such an idea, and for decision of this case the Court would not be justified in wandering far afield to conjure up a fanciful theory on which to base a decision as extraordinary as the idea which prompted the initiation of this case. The Court has only to read and understand accurately the complaint and the bill of lading contracts to find that the record discloses that, in rendering its judgment for the defendant in error, reversible error was committed.

The testimony of witnesses contained in the record described in detail the condition of the 867 bales on the arrival thereof at Tacoma. In his testimony, the witness *Charles Barker,* General Foreman for the Pacific Stevedore Company, superintending the unloading of the ship's cargo

when she docked at Tacoma (*Rec.* 396) stated, in substance, as follows:

That the ship's hold, under hatches No. 1 and No. 2, containing matting, tea, beans and peas and bales of waste silk, was practically full of water (*Rec.* 397). There was complaint while they were discharging the silk; in fact, all of the cargoes in the hatch were mixed up and the bags were bursting from the heat and the wet, and there was a complaint that they wanted to keep the water on them, so I went to the pump man and asked him if he would check his pumps and keep the water on, as the men were going to quit; I went and asked the men what was the matter and they said the bales and cargo was so warm that they could not handle it unless someone would keep the water up—to keep them from pumping the water out too fast. In fact, we went down in No. 2 and had a hose hole plugged at one time. There was a hole between No. 1 hatch and No. 2, which let the water run into the other hatch and we plugged it to keep the water up as high as we could while we were unloading it. The stench and fumes from the cargo was not very agreeable; it was a dirty smell. I know the bales were hot; they were smelling and steaming, of course, and smoking, but the men piled them on the dock (*Rec.* 400, 401). The heating of those bales was practically the same as I had previously had experience with in the heating of other commodities as a result of being wet. I presume the bales would have charred and possibly flamed, although I never saw anything flame. There undoubtedly was risk there, a hazard and a danger (*Rec.* 402). The men at work complained about the smell of the cargo when they

were down in the lower hold (*Rec.* 403) It was all bad, nasty work, being in the steam and the smell, etc. After we got down it stunk more. After we got to the water we did not have much complaint. The beans, rice, tea, mustard seed and other cargo in this hatch, was soaked with water. In fact, the sacks and the coverings had burst, so the stuff was all loose (*Rec.* 404). The grain was stored forward and the silk was stored in a separate section aft. It was all built up in the same hatch but stored in different places (*Rec.* 405).

F. L. Paggeot, Supercargo of the Osaka Shosen Kaisha, testified (*Rec.* 406):

I was in Tacoma when the "Canada Maru" came in with a hole stove in her side and the cargo damaged (*Rec.* 406). I recall the damage to the silk waste. I have to do with the fitness or unfitness of a cargo to be shipped. I recall when they unloaded the silk from the ship. When it came out of the ship it was steaming quite freely, but, on account of the water in the hold, I did not notice much heat. By "water in the hold," I mean the water came up from the damage in the bottom. The silk was all stowed from top to bottom in the after end of the hatch and the peas and bean were forward together. When they started to discharge the No. 1 hatch, the top was wet. There had been more water in there that had gradually gone out (*Rec.* 407, 408). When the cargo had been discharged and piled up there on the platform between the two docks, it was heating. The heat was not increasing, for the reason that they were playing water on it all the time. If it had been left to me, I would not have put it in the cars because it was wet and damaged. My idea was,

that it would catch fire (*Rec.* 408). There was a disagreeable smell all over the forward part of the ship and all over the dock. I noticed the bales which were loaded into two refrigerator cars. I went into the cars and examined them after the cars were opened the next morning. I put my hand on the bales. They were very hot before water was played on them (*Rec.* 409.)

James Ayton, shipper of grain and Cargo Surveyor for Lloyd's Agents at Seattle, testified (*Rec.* 411):

I have been looking after cargoes for pretty near 30 years on this Coast. I recall the "Canada Maru," which came into the dock in Tacoma with her cargo damaged. I surveyed some of the cargo of rice and stuff (*Rec.* 412). I was sent to Tacoma to survey a cargo of waste silk that was damaged that came out of the ship, to determine whether or not there was a risk in sending it forward in its then condition. I made an examination about the 23rd and 24th and made a report on the 26th of August (*Rec.* 413). I went over to Tacoma and met Mr. Cheney. He took me to the dock and showed the silk to me, as it was lying on the ground on some planks right between two docks. I went over those bales carefully with my hands, feeling of them, and I found them quite warm and steaming, and in some cases, where I put my hands down in, I found that some of the bales were quite hot; you could scarcely lay your hand upon them. I went all over the cargo in different places and put my hand down between, wherever I could, to feel, and I found 10 or 12 bales in that way that were quite hot. I came to the conclusion that it was a risky thing to ship

the bales. I should be scared that it would get on fire in transit. I made a report to my employer, Balfour, Guthrie & Company (*Rec.* 414). That report is Defendant's Identification No. 21. My signature is at the bottom. In making that examination, there was none of the railway officials following me around, or helping, or doing anything in connection with it; I did it all by myself. After the examination, I met Mr. Cheney, who asked me "what do you think of it?" I said "I consider that it would be a risk to ship" (*Rec.* 415).

David W. Huggins, Superintendent of L. C. Gillespie & Sons, Oil Importers, having an oil plant on the Milwaukee property between Docks No. 1 and No. 2, testified (*Rec.* 419):

I remember when the "Canada Maru" came in with a cargo of silk waste and other cargoes, damaged, in August, 1918. They unloaded the wet silk between my warehouse and what is known as Dock No. 1. There was just a six-inch fire wall separating them (*Rec.* 419). While it was there I became apprehensive with reference to its heating condition and its proximity to our own plant with the oil. I noticed that the wet silk stored there on an open dock was heating, and I feared that in time it might cause combustion, thereby endangering the stock I had in storage. I have in my lifetime experienced spontaneous combustion or heating from other materials—more particularly with corn and hay (*Rec.* 420). If there was enough heat there to char, in time it would cause it to combust, set fire to things that would be inflammable, in all probability. I examined the bales and inserted my hand in those bales (*Rec.* 421). They were

getting quite warm; so much so that anyone interested in anything else around there would feel that there was danger of fire (*Rec.* 422).

H. Meyer, in charge of what is known as the Pacific Oil Mills, the concern that dried the silk waste in August, 1918, for Mr. Taylor, testified (*Rec.* 426):

The silk waste came in box cars. I was there when the box cars were opened up. We had no great difficulty in getting it unloaded, except that the fumes and gases, arising from the bales fermenting in the cars, were so strong that the labor we had employed for the job refused to go in the cars, but our Foreman managed to get them out. The bales were smoking (*Rec.* 427). The laborers refused to go into the cars because the ammonia smell was so very strong (*Rec.* 433).

Joe Vice, working for the Chicago, Milwaukee & St. Paul Railway, in August, 1918, testifed (*Rec.* 434):

I was doing warehouse work. I helped to load it off the dock, or off the sand, into the box cars that transported the silk over to Seattle. That was on the 29th. The bales were so hot you could hardly hold your hands between them in the pile. I was working inside the car. It made us all sick (*Rec.* 435. It made me sick. It affected our eyes, burning them, and we loaded on a little while and I got so sick I couldn't stand it, so I got out of the car and quit working (*Rec.* 436).

Floyd Laycock, working for the Chicago, Milwaukee & St. Paul Railway Company at the docks, in August, 1918, testified (*Rec.* 437):

I was working with Joe Vice. The bales were rather warm to the hand; in fact, too warm to keep your hand on there for any length of time without it would burn. There was a very strong smell of ammonia and a stinking smell of vegetables or beans. It made me sick at my stomach; I had to vomit. It hurt my eyes also. I was unable to continue work and quit at the same time Mr. Vice quit (*Rec.* 438).

Pete Maybo testified (*Rec.* 440):

I was working for the Milwaukee road in August, 1918, with Joe Vice and Floyd Laycock, inside the box cars. My experience was that the bales were hot, steaming and smoking when we started to take the bales in by the platform and we could get the bales in the cars—they would drag it around with hooks, and when we would get the bale in we had to run out and get air. It affected me so that I started to throw up. It affected my eyes and face was burned (*Rec.* 440).

A. L. Groves, Superintendent of the Philippine Vegetable Oil Company at Tacoma Dock No. 1, testified (*Rec.* 391):

I recall when the "Canada Maru" came in with a lot of cargo damaged by sea water getting into it. They were unloading approximately 400 feet from our office. I recall the silk cargo which was being unloaded from the ship; I saw the first sling load coming up (*Rec.* 392). They started to put a load in their warehouse and then they stopped and put it on the open space between Dock No. 1 and the oil shed of Gillespie. I was on the ship every day that she was discharging. I know the men down in the hatches were complaining of the heat, after

they got down a little ways, and the smell. I certainly did notice the heat and the smell as it came out of the hatches, and after the cargo was discharged and piled up there on the platform, I noticed that it was heating (*Rec.* 393). I have seen hay that was not properly cured, a large stack, burn up by some overheating, and I have seen grain heat until it was charred. I would certainly not take the risk of sending anything forward that would spontaneously burn and char as I have seen other articles (*Rec.* 394). That is on account of my estimate that it would be a good chance for a fire. I would think so from the way the silk was heating when it was discharged and afterwards. I believed the silk placed in a tight car would be liable to heat and catch fire. When I saw the silk heating it was outside on the dock. It was hotter than I wanted to hold my hand on (*Rec.* 395).

F. J. Alleman, Freight Agent, in charge of the terminals and docks and head of the freight department in Tacoma, testifed (*Rec.* 335):

On August 10th, after the steamer had docked and started to discharge cargo, noticing the condition of the two forward hatches, I issued instructions that, under no circumstances, was any part of the damaged cargo to be accepted in the warehouse. It was to be placed in the open space between what is known as Dock No. 1 and the Gillespie Oil Shed. After I gave these orders, I watched the discharging for some little time and saw the condition on August 10th (*Rec.* 340). The steamer had to go to the dry dock, and when it came back from the dry dock and started to unload. I went down to observe it. That was sometime in the forenoon of August 12th. I noticed the condi-

tion of the cargo as it was coming out of the hold of the ship. The first was matting, tea, rice, beans and some silk waste. I went on the ship and looked in the hatches (*Rec.* 341). I was on the steamer a number of times on that particular day and I noticed that the water was only being pumped out sufficiently for the men to unload the slings and I noticed that the men were working in water and the wet cargo that it seemed to me could have been eliminated by pumping the water more rapidly, but I was informed at the time by the men in charge of the pump, that it was necessary to keep the cargo completely flooded due to the heat developing in the ship. I noticed that the bales as they were coming out were hot. The bales were somewhat warm, I would say, but not as warm as later on, due to the fact that they were thoroughly submerged in water (*Rec.* 343). I noticed the cargo generally, as it came out later on during the discharging. As soon as the cargo was exposed to the air, the water being pumped out, the cargo would heat. The beans and rice came out of the same hatch in which the silk was loaded (*Rec.* 343). I was again on the dock about an hour on the 13th and went about to examine the damaged cargoes that were being unloaded. I noticed the silk waste in the same manner that I did the other cargoes. They were all more or less heating on the platform (*Rec.* 344). I went back to the dock about 9 a. m. of the 14th. When I got to the dock on the morning of the 14th, I found two cars of this silk waste had been loaded. The doors had been opened prior to my arrival; they had been loaded on the previous afternoon and sealed up during the night (*Rec.* 345). They had been sprinkling the contents of both cars with water at the time that I arrived,

and, at this time, the fumes, steam and heat were still coming through the doors and through the vents of the two cars. I moved the bales to the side and got my hands on all sides of a number of bales. The heat was greatly intensified, and I felt that the heat was in excess of 135° Fahr. (*Rec.* 346). I immediately ordered the Foreman, Mr. Hennessey, to get hold of a switch engine and pull the cars away from the docks to an open space where, in case of fire, which I was afraid of, they would not endanger other property (*Rec.* 347). What made me feel there might be a fire result from the condition of these bales, was the fact that I have seen uncured hay, manure piles and grain, heat up to an extent where they would char, and, coming in contact with other foreign substances, create fires, and the heating of those bales did act similarly to the things I have described that charred and burnt other things. It so happened that Mr. Wilkinson was on the docks some time later on the same day (*Rec.* 348). We talked over the situation and Wilkinson agreed with me that the silk was dangerous and should not be forwarded, and we agreed between ourselves that the only authority that we would accept to forward the contents would be from Mr. Earling, the Vice President (*Rec.* 349). We decided that the dangers were so great that it would be entirely impracticable and wrong for us to endeavor to forward that cargo, unless it was authorized by the highest authority on the Coast of the Milwaukee Railroad Company, which was Mr. Earling. The unfitness of the silk was, that it was very obnoxious. Those conditions, to some extent, entered into our decision, but the prime factor I had in mind at all times was the danger to life and property due to fire (*Rec.* 350). We

were continually watering these cars or the contents until the 16th of August. On that day we unloaded them on the ground: we had difficulty in getting the men to handle the contents. They objected to the fumes and the heating and not so great at that time as later. This particular lot was kept wetted down every day until it was unloaded (*Rec.* 351). The bales were piled on the open platform between Dock No. 1 and the Gillespie Oil Shed. There were several industries in that vicinity. That particular oil shed was operated by Gillespie & Sons. They were afraid of fire (*Rec.* 352). The bales remained on that open platform until August 29th and were sprinkled with water daily, continually kept soaking it with fresh water (*Rec.* 353). I noticed that the bales were still heating, but not to the same degree that it did the first ten days (*Rec.* 354). On August 29th Mr. Taylor authorized or ordered us to load the bales into box cars for shipment to the North Pacific Sea Products Company located in Tacoma. We started to load into the cars at that time. The gang started to load two of the cars from the ground that had previously been loaded into the refrigerator cars, and after loading perhaps less than one-third of one car, the men began to get sick and finally they refused to work—that particular gang did—and we then persuaded another gang, by allowing them some extra time, to finish the loading of those two cars (*Rec.* 355). They had the same difficulty: not quite so much as the first gang. The extreme ammonia fumes and the heat that still remained in the cars made the men sick. I did not note the heating of the bales while they were being loaded into cars for this shipment ordered by Mr. Taylor. The bales were still very

hot, although not as hot as they were at the time they were unloaded from the two refrigerator cars. They had been kept wet and in the open air (*Rec.* 356). In my younger days, up to the time I was about 21 years of age, I was raised on a farm and I have at different times seen improperly cured hay heat up to such an extent that it had charred the entire inside and, whenever the air reached such stacks, it would blaze out. I have seen that many a time, and the heating of the contents of those two cars acted in a similar manner (*Rec.* 357).

All the testimony as to the offensive condition of the silk waste is further corroborated by the testimony of witnesses for the defendant in error as to the condition of the silk waste after its delivery at Providence.

Edgar W. Lownes, president of the American Silk Spinning Company, defendant in error, in his deposition stated that when the silk waste arrived the outside had colored, but he could not say as to the inside (*Rec.* 133). "It did not come in bales. It came in a large matted mass like manure, smelt very strong and I didn't want to handle it very much myself" (*Rec.* 134).

Theodore Bellinger, manager of the silk mills at Whitehall and Brooklyn, New York, testified in his deposition, referring to the silk waste in question, that he saw samples sent to Whitehall and afterwards was present at the auction held in New York and saw the goods in the warehouse and knew their condition. He stated that "The samples on exhibition there in the basement of the building were still, some of them, quite damp. The stock was very dark in color, and in our estimation

had been very much weakened. Some of it was discharging a very bad odor the morning we saw it there" (*Rec.* 163).

Charles E. Burling, the auctioneer who sold the goods in New York, in his deposition, answering a question as to the physical condition of the silk, testified: "In very bad shape, wet and tangled—it was assumed there were 867 bales, but no mortal man could tell whether there were 8,000 or 800—I will modify that, no mortal man could possibly tell how many there were. The bales were all broken, the worst, almost, I ever saw; we had to get some outside help, our men would not handle it, absolutely refused because of the odor and the difficulty. The condition was so bad that it would take 2, 3 or 4 men 15 minutes to half an hour to unwind a long skein, pull it out, otherwise you would have to cut it; it was so badly tangled they had great difficulty in handling it and then the odor drove away most of the buyers as well as the laborers" (*Rec.* 167-8).

While a carrier is generally required to accept for carriage all freight properly packed and delivered to him in suitable condition for transportation, he is not required to accept for shipment *any* freight which may be tendered. *If a carrier believes* that an article tendered him for transportation would be injurious to the public health or is likely to destroy the property of others or that it cannot by reason of its condition be safely transported, he has the right to decline to receive the shipment. Especially so as in this case, in which the railroad men in charge of the business *did believe* by reason of the obviously bad condition of the silk waste that there would be danger of spon-

taneous burning or ignition during transit on a long journey, which belief was shared in by others experienced in railroad transportation, and also confirmed by the testimony of expert witnesses in the case, that is, men having scientific knowledge as to the likelihood of such a commodity as silk waste in bales in carload lot quantities loaded in closed cars and heating as a consequence of being submerged in water, generating sufficient heat to culminate in spontaneous burning. Such expert evidence is in the record—the testimony of Mr. William D. Richardson, for twenty years chief chemist for Swift & Co. of Chicago (*Rec.* 441); Mr. C. P. Beistle, the chief chemist to the Bureau of Explosives, which is an organization of the railroads, steamship lines and express companies to promote the safety of transportation of explosives and other dangerous articles, and directly connected with the Interstate Commerce Commission (*Rec.* 473); and Mr. H. K. Benson, professor of chemical engineering and head of the department of chemistry of the University of the State of Washington (*Rec.* 494).

This identical proposition became crystallized into law by Interstate Commerce rules, formulated, promulgated and published on July 15, ~~1819~~, contained in *Exhibit* 35, page 41, Rule 1801, Subdivision (d) as follows:

> "The following are forbidden articles for transportation:
>
> "Rags or cotton waste oily with more than 5 per cent of vegetable or animal oil, *or wet rags, or wet textile waste,* or wet paper stock."

And Rule 1803, on page 42 of *Exhibit* 25:

> "This group includes all substances other than those classified as explosives, that are

liable, under conditions incident to transportation, to cause fires by self-ignition through friction, through absorption of moisture, or through spontaneous chemical changes."

And, on page 58, Rule 1838, Subdivision (a):

"Unless the preparation and nature of fibers or fabrics impregnated or saturated with animal or vegetable oils is such as to prevent all spontaneous heating in transit, such materials must be placed in hermetically sealed, metal-lined wooden boxes or crates,"

And

Subdivision (c):—"Rags, rag dust, waste wool, hair *and other textile wastes,* must not be offered for shipment except when bagged, baled or in other packages *and not when wet.* Waste paper or paper stock must not be offered for shipment when wet."

The definition of "textile," in a commercial sense, is:—"Cotton, woolen, linen, silk or laces which is, or may be, woven—a fabric made by weaving." This implies that the material for weaving is in a raw and not a finished state.

Wood vs. *Allen*, 111 Iowa; 82 N. W. Rep. 451.

QUESTION OF OWNERSHIP

We come now to the *fifth* question for discussion, viz.: whether or not the defendant in error owned the silk and by reason of the ownership of the goods, acquired or ever had any right of action arising out of the contract sued on. Or, stated conversely, did any right of action for damages accrue to the American Silk Spinning Company?

The claim of that corporation is based upon its assumption of a right of *absolute* ownership of 867 bales of damaged silk waste. Its claim is for damages for a breach of a carrier's contract.

At the very outset it is to be noted that the American Silk Spinning Company is not a party to the bill of lading contracts. It is not so named, nor was it the consignee of the merchandise to whom bills of lading were issued and delivered by the initial carrier or agent of the plaintiff in error.

The evidence setting forth the facts regarding the relationship of that corporation to the property that was damaged in transit is contained in the deposition of Edgar W. Lownes, president of that corporation (*Rec.* 127) wherein his testimony on cross examination is of the following tenor:

CROSS-EXAMINATION BY MR. KORTE

"78 Q. This shipment moved on bills of lading with a draft attached?

A. No, no draft attached.

79 Q. It was an order bill of lading?

A. Letter of credit.

80 Q. Well, whatever it was, it had to be taken up somewhere?

A. The payment had been taken up.

81 Q. And the letter of credit, what we call a draft, came on?

A. No, never came on. Assigned to the bank and endorsed over to us.

82 Q. And you paid it then.

A. No. That was bought on a four months letter of credit. The shipment is made from China addressed to the bank with a four months letter of credit. That isn't due until four months after the shipment is made. The bankers give us the bills of lading on a trust receipt

from us guaranteeing that if we use the silk and sell it the silk belongs to them until it is paid for.

83 Q. When did you make that payment?

A. Four months after the date of shipment, or practically four months.

84 Q. And that payment, of course, was made to the bankers?

A. Yes, when it was due.

85 Q. The bankers named in the bills of lading who endorsed them over to you?

A. Yes. They advanced the money to the Chinamen."

By stipulation (*Rec.* 193), Mr. Lownes' testimony was deemed to be supplemented as if he had testified "that he received the four bills of lading with the endorsements as shown on the bills of lading, on the 7th day of August, 1918."

That testimony, in connection with what appears by the endorsements on the bill of lading documents, is all of the testimony relating to ownership of the silk by the defendant in error.

These are order bills of lading, each of which in terms provides that "the surrender of this bill of lading properly endorsed shall be required before delivery of the property."

The silk waste was damaged in transit by the marine disaster on the 30th day of July. The bills of lading were endorsed, according to the testimony of Lownes, per the stipulation, on the 7th day of August, and, according to his testimony in his desposition, the delivery of the bills of lading so endorsed did not transfer the title to the goods, because he states "the bankers give us the bills of lading on a trust receipt from us guaranteeing

that if we use the silk and sell it the silk belongs to them until it is paid for" (*Rec.* 128); and the payment was made to the bankers when it became due, that is four months after the date of the shipment from Hong Kong, China. As to that date it must be assumed that the shipment date was the same as the the bills of lading, the last of which was on the 24th day of June; so that the due date and the payment was made on the 24th day of October, 1918. Until that date the American Silk Spinning Company was not the owner and no right of action accrued to it by virtue of its ownership of the goods prior to that date. Prior to that date the 867 bales had been submerged in sea water, transportation thereof by the railroad carrier in that condition had been refused, a representative of the underwriters and owners had taken posession and submitted the goods to the process of drying, which by the allegations of the complaint caused the damage complained of.

By provisions of the Interstate Commerce Law relating to bills of lading, now grouped and codified in U. S. Compiled Statutes, Compact Edition, Secs. 8604a *et seq.*, such documents are contracts and also muniments of title, so that the title to the goods vests in the party having the right to transfer the same by endorsement of the documents. They are negotiable instruments so that the carrier is bound to make delivery of the goods to the holder of the bills of lading properly endorsed.

Russo-Chinese Bank vs. *National Bank of Commerce of Seattle*, 241 U. S., 403.

In that case the Supreme Court, referring to a bill of lading for a cargo of flour, said: "The bill of lading endorsed in blank represented the flour."

Inasmuch as the American Silk Spinning Company was not the owner of the merchandise at the time it was injured a right of action for the injury was not acquired by it as an incident to the title subsequently acquired. The rule is that when a right of action for damages accrues, it is a personal right and not an incident or appurtenance of the property.

In the case of *Northern Pacific Railway Co.* vs. *Murray,* 87 Fed. Rep., 648, this court reversed a judgment in favor of a land owner for damages for the unauthorized taking of land by a railway company for use as its right of way; the sole reason for reversing the judgment being that the plaintiff was not the owner of the land when the railroad company took it. The court held that the right of action did not pass to the vendee as if it were a right running with the land.

That decision was grounded upon the authority of *Roberts* vs. *Railroad Co.,* 158 U. S., 1, in which the Supreme Court said:

> "It is well settled that where a railroad company having the power of eminent domain, has entered into actual possession of the land necessary for its corporate purposes, whether with or without the consent of the owner of such land, a subsequent vendee of the latter takes the land subject to the burden of the railroad; and the right to payment from the railroad, if it entered by virtue of an agreement to pay, or to damages, if the entry was unauthorized, belongs to the owner at the time the railroad company took possession."

And stating further, after citation of cases:

> "Numerous authorities to the same effect

> may be found collected in *Woods on Railroads,* Vol. 2, page 994, and the conclusion established by the decisions is there said to be that the damages belong to the owner at the time of the taking, and do not pass to a grantee to the land under a deed made subsequent to that time, unless expressly conveyed therein."

The same ruling was made by the District Court for Oregon in the case of *Eastern Oregon Land Co.* vs. *DeChutes R. Co.,* 213 Fed. Rep., 897.

It was held that a right of action for damages does not pass with the transfer of title to the damaged property, in the case of *Bennett* vs. *Dickenson,* 190 Pac., 757 (Kan.).

See also *Alabama Railway* vs. *Mt. Vernon,* 4 So. Rep., 356 (Alabama).

Bankers' letters of credit are a convenience in mercantile transactions where vendors part with possession by shipment to purchasers at a distance on credit, the effect being that the vendor gives credit to the banker issuing such document, and bills of lading for the shipment issued to the banker or to his order convey absolute title to the goods, entitling him to all of the rights of an owner until the buyer for whose benefit the letter of credit was given, pays the purchase price due to the bank.

In the case of *Moore* vs. *Bird,* a Massachusetts case, 77 N. E. Rep., 643, the law is stated in the syllabus as follows:

> "Where bankers issued mercantile letters of credit to merchants under an agreement that goods purchased by means of the credit, as well as bills of lading of such goods, should be held by the bankers for security pursuant to which agreement the bills of lading were

made out to the order of the bankers and sent directly to them by the sellers of the goods, the bankers acquired title to the goods."

In the case of *Moors* vs. *Drury*, another Masschusetts case, reported in 71 N. E. Rep., 810, the court held that where merchandise is imported under letters of credit issued to the importer under an agreement that the bills of lading shall be made to their order and that the consular invoice shall be sent to them, and the merchandise is consigned to them, and they retain title until it is sold in their name, and by the course of dealing between them and the importer they pay to him the surplus of the proceeds, after deducting therefrom the amount of their advances, commissions, duties and custom house brokers' charges, they are the owners of the merchandise, and not mortgagees or pledgees.

The rule of law thus announced by the Massachusetts court is also the rule of law in such cases in the federal courts.

In the case of *Century Throwing Co.* vs. *Muller,* 197 Fed., 252 (3rd C. C. A.), the Century Throwing Company, wishing to purchase raw silk in Japan, arranged that the shipment should be made on the basis of a six months sight draft drawn against the silk, guaranteed by a bankers' letter of credit which was issued by the defendant in error, bankers in New York, Relying upon the guarantee by the bankers, as set forth in the letter of credit, the silk was shipped to New York on a *bill of lading in the name of the bankers,* and deliverable upon their order. The duplicate bills of lading, with a consular invoice, were sent directly to the bankers, and in due course were received by them, as was also the original bill of lading with the draft attached. On arrival of the goods in New

York, and on the same day, the bankers, endorsed the bill of lading and delivered it to the president of the Silk Company, receiving from him at the same time a *trust receipt,* signed on behalf of his company, which receipt retained the title to the silk in the bankers who issued the letter of credit. Upon these facts, the Circuit Court of Appeals held that the title to the silk was in the bankers.

The opinion in that case by Judge Gray, shows great care in the consideration of the law applicable to facts exactly like the facts of the case at bar. Wide research is shown by the many decisions of high authority cited therein, quoted from and commented upon, including the decision of this Court in *Merchants Bank* vs. *McGraw,* 76 Fed., 930.

The trial court, instead of making findings according to its own understanding of the evidence, merely adopted and signed a complete set of findings prepared by counsel for the defendant in error, which are partial and unfair. This is especially manifest in paragraph VI of the findings (*Rec.* 38), which recites the transfer of the bills of lading without mentioning the important fact that the defendant in error gave, in exchange for those documents, trust receipts, guaranteeing that the goods should remain the property of the bankers until paid for. The finding, as the court adopted it, means, that by the endorsement and delivery of the bills of lading the title to the goods passed to the defendant in error, although, by the testimony of the president of that corporation, it was guaranteed by an instrument in writing that the title did not then pass, but remained vested in the bankers until payment, and the payment was made when the letter of credit came due, which, as above shown, was several months later.

Damages.

The measure of damages, if there were liability therefor, ought to have reference to the amount of the actual impairment of value of the goods, which, by the evidence in this case, including the samples which are exhibits of the goods after the process of reconditioning, establishes that the actual intrinsic value was diminished in only a small degree. The silk waste, although discolored by the sea water, was, on delivery at Providence, in demand and usable, and, for the purpose for which it was intended—that is, for making powder and cartridge bags for the Government—the value was impaired but little if at all (*Rec.* 536 to 550). But the view of the case most favorable to the defendant in error would be to assume the measure of damages to be the difference in market value of the goods in an undamaged condition and the market value of the goods as they were when delivered at Providence. It was by assuming that to be the legal measure of damages that the court in its findings fixed the amount, and that was done by a computation of the market price of silk waste as given in the deposition of Edgar W. Lownes, stating the different prices of Canton silk waste of the grades numbered 1 and 2, and it was assumed that 500 of the 867 bales were of grade No. 1, having a higher market value than grade No. 2. By that method of computation, the amount of damages awarded was fixed at $105,622.90. There is nothing in the testimony to warrant the court in fixing the number of the higher grade and more valuable bales at 500; the only scintilla of evidence bearing on that precise point is in the deposition of Mr. Lownes, who had no information on which

to determine the number of bales of the different grades. That is so, because in his own words (*Rec.* 134) "it did not come in bales; it came in a large matted mass like manure."

We deem it not worth while to discuss the differences between the testimony of Mr. Lownes and witnesses for the plaintiff in error with respect to market values, and it is unnecessary to do so, because Mr. Lownes was the only witness who testified for the defendant in error as to the amount of damages in dollars and cents, and he fixed the total value of 867 bales, after being wet by sea water, on arrival at Providence, at $113,088.40 (*Rec.* 126, 127), that amount being ten per cent less than the market value of the silk waste if it had been undamaged, and he conceded that a ten per sent discount would have to be allowed as against full value. The evidence on the side of the defendant in error, which is not disputed, is, that the net proceeds from 867 bales that were sold at auction in New York amounted to $14,815.67 (*Rec.* 167). Subtracting the net proceeds of the auction sale from the total value as testified by Mr. Lownes, the balance, which would represent the actual damage, amounted to $98,272.73. Those figures represent the highest amount of damages which could be legally awarded against a wrong-doer legally liable for the damage. If the plaintiff in error were liable at all, he would be entitled, by the stipulation in the bill of lading contracts, to the full benefit of the insurance effected. Now the receipts given to the Atlantic Mutual Insurance Company (*Plaintiff' Ex.* 29; *Rec.* 661) show that the defendant in error received from the insurer

a total amount of $102,052.96, which covers the total amount that may be assumed as the actual loss on the goods, with a liberal margin for interest. The plaintiff in error is legally entitled to the benefit of that insurance money, because it is written in the bill of lading contracts. That such a stipulation in a carrier's contract is valid and binding upon the parties to the contract, has been definitely estalished by repeated decisions of the Supreme Court of the United States.

Inman vs. *Ry.,* 159 Fed. Rep., 960, 973.

Phoenix Ins. Co. vs. *Ry.,* 117 U. S., 312.

Wager vs. *Providence Ins. Co.,* 150 U. S., 99.

Mobile & M. Ry. Co. vs. *Jurey,* 111 U. S., 584, 593.

The latest desicion by the Supreme Court is in the case of *Luckenbach* vs. *McCahan Sugar Refining Co.,* 248 U. S., 139. In that case the opinion, referring to a similar clause in the bill of lading contract, said:

> "Such clause is valid, because the carrier might himself have insured against the loss, even though occasioned by his own negligence; and if a shipper, under a bill of lading containing this provision, effects insurance and is paid the full amount of his loss, neither he nor the insurer can recover against the carrier."

There are other authorities, but the decisions of the Supreme Court are conclusive and binding upon this Court, and, if for no other reason, that clause in the contract must constrain this Court to reverse

the decision of the District Court and order the action dismissed.

Our last assignment of error is on the ground that the findings are insufficient to support the judgment. That is because there is no finding by the court that the bill of lading contract has been breached. The judgment rests upon findings numbered IX, X and XI, which contain no reference to the contract and do not find that there was any supplemental or substituted contract. In lieu of a contract, the ninth finding recites substantially Mr. Taylor's testimony with respect to his conversations with Cheney, the clerk. It is unthinkable that this Court can affirm a judgment having no other foundation than a conversation between these two men. *In the first place, Mr. Taylor does not show that he had any authority to make a contract for the defendant in error. All that he says in his testimony is, that he acted as a representative of the underwriter and owners, without attempting to identify the owners.* In the second place, Cheney had no authority to make a contract, and, if they were both fully authorized, what they said to each other did not culminate in a contract. Were the Court to make an attempt to establish a contract out of that testimony, it would be unable to find authority therefor coming from either party, or to state the terms agreed to, or what, if any, consideration was to pass from one to the other. We wish the Court to especially take note of the fact that *Taylor did not promise anything to Cheney.* The only offer he appears to

have made was in a conversation with Barkley, which was, to pay the expense merely of one or two men to travel with the shipment to see that the wetting and icing were properly attended to.

Respectfully submitted,

GEO. W. KORTE,

C. H. HANFORD,

Attorneys for Plaintiff in Error.